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# RE ANG SWEE HIAN; EX P AVENUE SECURITIES SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[BANKRUPTCY NO: D8-29-3599-2005]
B 21 MAY 2008

***BANKRUPTCY:*** *Creditor's petition - Setting aside - Appeal to set aside creditor's petition for bankruptcy - Interest - Arrears - Recovery of - Period of limitation - Whether should start from date of judgment - Limitation Act 1953,*
C *s. 6(3) - Whether contravened - Whether appeal dismissed*

***LIMITATION:*** *Interest - Arrears - Action for recovery of arrears of interest - Whether recoverable - Period of limitation - Whether should start from date of judgment - Limitation Act 1953, s. 6(3) - Whether contravened*

D This was an appeal by the judgment debtor against the decision of the Senior Assistant Registrar in dismissing the judgment debtor's application to set aside the creditor's petition for bankruptcy. According to the judgment debtor, the recovery of interest by the judgment creditor was made pursuant to a court order dated 11 October 1996. It was the
E submission of the judgment debtor that the judgment creditor had taken approximately eight years and nine months before issuing the bankruptcy notice on 2 September 2005 and the notice had included the interest which had by s. 6(3) of the Limitation Act 1953 expired as it was no longer recoverable after six years had passed. The judgment creditor,
F however, submitted that in this case the judgment in default was obtained by the judgment creditor on 22 September 1995 and on 11 October 1996, the judgment debtor's application to set aside the judgment in default was dismissed and the Sessions Court Judge had varied the interest on the judgment in default from 14% to 8% per
G annum to commence from 3 August 1995. The judgment creditor further submitted that the bankruptcy proceeding was filed on 2 September 2005 after leave of court was obtained on 12 August 2005 and the amount of interest charged was from 3 August 1995 to 2 August 2001.

H **Held (dismissing the appeal):**

**(1)** Section 6(3) of the Limitation Act 1953 provides clearly that an action upon any judgment can only be brought before the expiration of 12 years and that no arrears in respect of any interest shall be
I recovered after the expiration of six years. For the purpose of determining when the period of limitation should begin in respect of both an action to claim the judgment sum and the interest due

thereunder, time should start from the date of judgment, that was 22 September 1995. What the judgment creditor was claiming was the principal sum of RM172,900.89 and interest on the principal sum at 8% of RM85,329.42 amounting to RM258,230.31. The claim on the principal sum had not exceeded twelve years and the judgment creditor was only claiming interest up to a period of six years from the date of judgment. It followed therefore that the judgment creditor had not contravened s. 6(3) of the Limitation Act 1953. (paras 7, 8, 9 & 10)

**Case(s) referred to:**
*Malaysian Soil Investigation Sdn Bhd v. Emko Holdings Sdn Bhd [1994] 1 CLJ 267 FC* ***(refd)***
*Moscow Narodny Bank Ltd v. Ngan Ching Wen [2004] 2 CLJ 241 FC* ***(refd)***
*Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787 FC* ***(refd)***
*Re Ernest Cheong Yong Yin, ex p United Malayan Banking Corp Bhd [1997] MLJU 325* ***(refd)***
*United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin [2002] 2 CLJ 413 FC* ***(refd)***

**Legislation referred to:**
Limitation Act 1953, s. 6(3)

*For the judgment creditor - Rajpal Singh; M/s Affendi Zahari & Rakan-Rakan*
*Fo the judgment debtor - John Henry; M/s John Assoc*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Kang Hwee Gee J:**

**[1]** This is an appeal by the judgment debtor against the decision of the senior assistant registrar in dismissing the judgment debtor's application to set aside the creditor's petition for bankruptcy.

**[2]** The grounds: (*verbatim* submission by counsel for the judgment debtor)

i. Only one issue specifically on s. 6(3) of the Limitation Act 1953 which states as follows:

> An action upon any judgment shall not be brought after the expiration of twelve year from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

ii. In the instant case tracing the history, it is clear that the recovery of interest by the judgment creditor was made pursuant to a court order dated 11 October 1996. However the bankruptcy notice was only issued on 2 September 2005 which is eight years and nine months after the date of the court order. This contravenes s. 6(3) of the Limitation Act 1953 as it exceeds the time frame allowable under s. 6(3). The judgment creditor had taken approximately eight years and nine months before issuing the bankruptcy notice on 2 September 2005 and the notice had included the interest which had by s. 6(3) expired as it was no longer recoverable after six years had passed. See *Malaysian Soil Investigation Sdn Bhd v. Emko Holdings Sdn Bhd* [1994] 1 CLJ 267; 268 Held (3):

> Interest due on a judgment continues to be due until full payment is made. The Act certainly does not prohibit the payment of the arrears of interest due on the judgement debt beyond the six years after they become due as long as the act of recovery is made before the expiry of the six year period.

And at p. 270:

> It is also appropriate at this juncture, in view of the submission of interest not being repayable after the limitation period of six years, to discuss s. 6(3) of the Act which reads:
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> > An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and **no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due** (emphasis added).
>
> At first reading, the underlined second limb seems to create the impression that arrears of interest in respect of any judgment debt cannot be repayable after the expiration of six years from the date the interest became due meaning that they can only be paid for the six years after becoming due, which is the basis of learned Counsel for the respondent's contention, but actually this is an erroneous impression and the correct interpretation should be that one cannot take action to recover the arrears of interest After six years had lapsed from the time they became due. The crucial word in the second limb is therefore "after" to denote that any act of recovery of the arrears of interest must be before the limitation period of six years had expired and "recovered" should mean "claimed" and cannot be held to mean "repayable". In the instant case, the judgment was about two years and three months after it became due and was therefore well within the limitation period. The interpretation given on the erroneous impression would create a mockery of

sorts as all judgment debtors would take their own sweet time to pay the judgment debt when in actual fact the purpose of interest is to speed up and not to delay payments.

**[3]** See also *Re Ernest Cheong Yong Yin, ex p United Malayan Banking Corp Bhd* [1997] MLJU 325 at p. 9:

> Counsel's submission that interest was chargeable only up to the six-year limit namely from 20.5.85 to 19.5.91 was rejected by the learned judge. The JD relied on Emko and thus contended that UMBC should have commenced the bankruptcy proceeding latest by 14.10.93 that is, 6 years from the date of the judgment. The JD thus went on to submit that since the BN was issued out on 24.1.96, the act of recovery of the arrears of interest had been done after the limitation period of 6 years had expired. As such, UMBC cannot take action to recover the arrears of interest after 6 years had elapsed from the time the arrears of interest had become due. The BN is therefore defective as it contained the interest sums of RM106,863.04 and RM72,433.97 which are already time-barred in so far as action for recovery of the said sums is concerned.

And at pp. 20 to 22:

> A closer reading of section 6(3) of Act 254 may give us the answer. The phrase "... after the expiration of six years from the date on which the interest became due" would be the key. Hence I would agree with respect with the decision of the learned Judge in Wee Chow Yong. In the instant case the maximum allowable amount of interest that can be claimed would be from 1.4.86 until 31.3.92. However, in going one step further based on Malaysian Soil, as the act of recovery was only taken after the 6-year limitation had set in, UMBC would not be entitled to claim the interest as embodied in the judgment of 15.10.87.
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> ...
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> ...
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> I hold that the claim of interest at the rate of interest as agreed to by the parties commencing from the date of default would be time barred by virtue of subsection 6(3) of Act 254 if claimed 6 years after the date of commencement. The judgment creditor would however be entitled to claim the 8% per annum on the judgment debt commencing from the date of judgment until the date of realisation as this is a mandatory provision. This would be the proper interpretation bearing in mind that, in as much as a judgment creditor who chooses to sit on his judgment must suffer the consequence of the period of

limitation working against him, judgment debtors also cannot take their own sweet time to pay up the judgment debt. Hence where the action for recovery is taken within the limitation period the judgment creditor would be entitled to the higher agreed rate of interest but if he only takes action to recover the debt after six years he would only be allowed the maximum rate of 8% per annum on the principal sum due.

I would therefore agree with the learned Judge in Malaysian Soil to this extent. I therefore allowed the appeal and set aside the order of the learned SAR dated 26.4.96 as the act of recovery, ie, the issuance of the BN on 24.1.96 was well past the date when limitation had set in. I had earlier indicated that I would deal with section 131 in the later part of my judgment. As the issue on the amount of interest claimable is one of great import, I am of the view that section 131 cannot be used to cure the defect which goes to the root of the BN. UMBC is therefore not entitled to recover the interest sums of RM106,863.04 and RM72,433.97. As such the BN is invalid and has to be struck out.

**[4] Reply By Counsel For The Judgment Creditor: (*Verbatim*)**

i. The judgment debtor was adjudicated a bankrupt on 3 March 2008.

ii. Section 6(3) of the Limitation Act 1953 – can claim arrears of interest for six years from the date interest accrued. In this case judgment in default was obtained on 22 September 1995 and on 11 October 1996, the judgment debtor's application to set aside the judgment in default was dismissed but the interest of 14% in the judgment in default was varied by the order dated 11 October 1996 from 14% per annum to 8% per annum and to commence from 3 August 1995. In this case the bankruptcy proceeding was filed on 2 September 2005. It was after leave of court was obtained on 12 August 2005 to execute the judgment after six years. The amount of interest charged was from 3 August 1995 to 2 August 2001.

**[5] Reply By Counsel For The Judgment Debtor: (*Verbatim*)**

i. Sessions Court judge in Muar had misled herself in varying the interest rate which the judgment creditor had claimed from 14% per annum to 8% per annum and to order it to start from 3 August 1995.

ii. Applying Section 6(3) of the Limitation Act 1953 therefore, the interest becoming due is from the date of the judgment ie, 11 October 1996.

iii. After 11 October 1996 the judgment creditor has six years limitation period to claim arrears of interest. See *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin* [2002] 2 CLJ 413 at held:

(2) The second limb of s. 6(3) of the Act provided that an action to recover arrears of interest must be brought within six years of the judgment date and because of the word 'arrears' it could not denote interest which was still not due. It must, therefore, mean arrears of interest at the time of recovery and could not include future interest even if the amount due had not been paid.

(3) Therefore, a person filing an action for recovery of arrears of interest on the last day of the six year period from the judgment date would only be entitled to that amount and nothing more. If he filed it on the first day after the six year period, his action would be barred by limitation, arrears of interest included.

(4) In the instant case, although the amount of arrears of interest claimed was only for six years from the judgment date, the bankruptcy notice had been filed long after the limitation period of six years. Accordingly, the bankruptcy notice was rendered invalid. As for the prejudgment interest, despite the Court of Appeal's finding on this point, the court held that that was in order as it was merged with the principal amount from the date of the breach, and which was the standard stipulation in all contracts, to become the judgment debt.

iv. Here the judgment creditor is claiming arrears of interest after six years from the date it became due which is on the date of judgment that is 11 October 1996. So he cannot claim interest. See *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787 at held:

(3) Section 6(3) of the Act is a one-sentence sub-section and must be read together. As such, it was misleading to refer to s. 6(3) of the Act as 'first limb' and 'second' limb and thereby giving the impression that they were to be read separately. Under the Act, the limitation of action is six years. The provision is silent on the limitation period for claiming arrears of interest because it is automatically limited to six years. Therefore, where the limitation is action is 12 years as in s. 21 and 6(3) of the Act, the limitation period for claiming arrears of interest is six years.

(4) Accordingly, the first question was answered in the affirmative, namely, s. 6(3) of the Act applied to bankruptcy proceedings and while a bankruptcy proceeding may be brought within 12 years of the date of judgment, arrears of interest may only be claimed for a period of six years from the date of the judgment.

(5) In the instant case, the judgment was obtained on 23 October 1987. Even though interest was calculated from 1 December 1985, it merged into the judgment debt and therefore, the date the interest became due was the date of the judgment and not the earlier date. The BN was filed eight years and five months from the date of judgment and as such was not out of time. However, the arrears of interest may only be claimed for a period of six years from the date of the judgment. Since the arrears of interest claimed contained arrears of interest outside the six-year period, the BN was invalid.

v. Here the judgment creditor is wrong to claim interest from the date of the earlier judgment dated 22 September 1995 because the interest claimed there is more than 8%.

**Findings And Decision**

**[6]** The confusion seems to have arisen from the variation made by the Sessions Court judge Muar on the interest that the judgment creditor was entitled to make.

**[7]** The facts disclosed that after the judgment in default was obtained by the judgment creditor, the judgment debtor made an application to set aside the judgment in default before the Sessions Court judge. Upon hearing the application by the judgment debtor the Sessions Court judge varied the interest on the judgment in default from 14% to 8% per annum to commence from 3 August 1995.

**[8]** Section 6(3) of the Limitation Act 1953 provides clearly that an action upon any judgment can only be brought before the expiration of 12 years and that no arrears in respect of any interest shall be recovered after the expiration of six years.

**[9]** In the instant case therefore for the purpose of determining when the period of limitation should begin in respect of both an action to claim the judgment sum and the interest due thereunder, time should start from the date of judgment, that is to say 22 September 1995. This is so notwithstanding that the Sessions Court judge had subsequently varied the interest rate obtained by the judgment creditor from 14% to 8% per annum as interest rate can only exist if there is a judgment and the judgment in this case was made on 22 September 1995.

**[10]** Having considered the judgment creditor's petition it is clear that what the judgment creditor is claiming is the principal sum of RM172,900.89 and interest on the principal sum at 8% of RM85,329.42 amounting to RM258,230.31. The claim on the principal sum has not exceeded twelve years and the judgment creditor is only claiming interest

up to a period of six years from the date of judgment. It follows therefore the judgment creditor has not contravened s. 6(3) of the Limitation Act 1953.

**[11]** The language in s. 6(3) itself is clear. In respect of the claim on the judgment the words used is "shall not be brought after the expiration of twelve years" and in respect of the claim on the arrears of interest the words used is "no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due".

**[12]** The Federal Court in the later case of *Perwira Affin Bank Bhd, supra*, per Abdul Hamid Mohamad FCJ has interpreted the sub-section to mean that:

> ... while a bankruptcy proceeding may be brought within 12 years of the date of judgment, arrears of interest may only be claimed for a period of six years from the date of the judgment.

**[13]** The judgment appears to have confirmed the court's two previous judgments in *United Malayan Banking Corp Bhd, supra* and *Moscow Narodny Bank Ltd v. Ngan Ching Wen* Rayuan Sivil No. 03-1-2003 (W) by the following passage appearing in *Perwira Affin Bank Bhd* [2004] 2 CLJ 241, *supra*:

> Again, with respect, I am of the view that the learned judge was wrong when he said that the Act does not prohibit the claim for arrears of interest beyond six years. Both in *Ernest Cheong* and *Moscow Narodny Bank Bhd* it was held and it is also my view (even though for different reasons) that in a bankruptcy proceeding arrears of interest may only be claimed for a period of six years from the date of judgment.

**[14]** The appeal is dismissed with costs.